IN THE INCOME TAX APPELLATE TRIBUNAL

NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND

SHRI K.M. ROY, HON'BLE ACCOUNTANT, MEMBER

ITA No.47/NAG/2023
(Assessment Years: 2016-17)

Dy.CIT – Central Circle – 2(1) Room No. 312, 3rd Floor Aayakar Bhavan Telangkhedi Road, Civil Lines Nagpur – 440001	*v.*	M/s. Aakar Hotels Shop F-6, 1st Floor, 209 West High Court Road, Dharampeth Nagpur - 440010 **PAN – AANFA2453L**
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	Shri Saket Bhattad, Advocate
Revenue Represented by	**:**	Shri Sandipkumar Salunke, CIT(DR)
Date of conclusion of hearing	**:**	18.03.2025
Date of pronouncement of order	**:**	09/06/2025

O R D E R

PER K.M. ROY, ACCOUNTANT MEMBER

The Revenue has filed the appeal challenging impugned order passed by the Learned Commissioner of Income Tax (Appeals) – 3, Nagpur [hereinafter in short "Ld.CIT(A)"] vide Order No. CIT(A)-3, Nagpur/10658/2015-16 dated 28.12.2022 for the A.Y. 2016-17.

2. Revenue has raised following grounds of appeal, in its appeal: -

"1. On the facts and in circumstances of the case, the Ld.CIT(A) erred in deleting the addition of Rs.2,67,14,897/- on account of long term capital gain,

without appreciating the fact that the addition of Rs.2,67,14,897/- made by the AO was supported with finding that sale deed/assignment deed was duly registered on 29.03.2016 and the purchaser deducted the tax and filed TDS return in from of 26QB showing TDS of Rs. 3,30,000/- on account of purchase of property from M/s Aakar Hotels.

2. On the facts and in circumstances of the case, the Ld CIT(A) erred in deleting the addition of Rs.2,67,14,897/- on account of long term capital gain, without considering the fact that the sale deed /assignment deed itself shows complete transfer of property and not a part of property moreover it is not at all applicable to the legal maxim "nemodat quod non habet", which literally means no one can give what they do not have, as relied on by Ld. CIT(A). Since the property belonged to assessee M/s Aakar Hotel not of the individual partner.

3. The Ld. CIT(A) erred in accepting the assessee contention that the sale deed/ assignment deed is in fructuous and non -executable due to the fact that the land belongs to the partners and not the partnership firm M/s Aakar Hotels because the sale deed/assignment deed itself shows complete transfer of all piece and parcel of land together with the building standing thereon covering a total build-up ara, including all connections.

4. Any other ground and fact to be raised at the time of appeal."

3. Brief facts of the case are, Search and Seizure action was conducted in the case of Atul Yamsanwar & Others on 25.06.2019. Atul Yamsanwar & others, are partners in the said partnership firm. Assessee had not filed any return of income for the assessment year under consideration. The case of the assessee was reopened under section 147 of the Act on account of reason to believe that income emanating from transfer of property has escaped. Assessing Officer noticed that assessee had sold hotel property belonging to M/s Aakar Hotels to M/s PNB Construction company for a consideration of Rs.3,30,00,000/- on 20.02.2016 vide its assignment deed. In compliance to notice under section 148 of the Act, assessee filed NIL return of income for the year under consideration i.e. A. Y. 2016-17. Assessing Officer concluded the assessment vide assessment order dated 24.08.2021 and assessed total income at Rs.2,67,14,897/- by making

addition of Rs.2,67,14,897/- on account of Long Term Capital Gain (In short "LTCG") arising out of selling of hotel property belonging to Aakar Hotels to M/s PNB construction company.

4. Being aggrieved by the order of the Assessing Officer, Assessee preferred an appeal before the Ld.CIT(A) and filed its submissions. Ld.CIT(A) after considering the submissions of the Assessee, deleted the addition vide order dated 28.12.2022.

5. Being aggrieved by the order the Ld.CIT(A), Revenue is in appeal before us by raising the above grounds of appeal.

6. Learned CIT(DR) (in short "Ld.DR") vehemently supported the order of the Assessing Officer. Further, Ld.DR filed his written submissions and the same are reproduced below:-

> ***"2. Issue of LTCG arising out of selling of hotel property***
>
> *i. The fact of the present case is that the assessee has never filed its return of income for the A. Y. concerned till the date of search.*
>
> *ii. During the search proceedings Atul Yamsanwar admitted that he is partner in M/s Aakar Hotels. Assessee sold hotel property belonging to Aakar Hotels to M/s PNB construction company, Plot no 9, Palm Residency, CIDCO colony, Butibori Nagpur for consideration of Rs 3,30,00,000/- on 20/02/2016 through assignment deed.*
>
> *iii. Further on verification it is seen that even the Purchaser deducted tax and filed TDS return in form 26 QB showing TDS of Rs 3,30,000/- on account of purchase of property from Aakar hotels. Thus Assessee gained long term capital gain on above transaction.*
>
> *iv. However in response to questionnaire, assessee submitted that the TDS is wrongly deducted as there is no transfer of property. The claim of the assessee that the TDS was wrongly deducted and there is no transfer of property is factually incorrect as the assessee had submitted a copy of deed of assignment through which a property was transferred to M/s PNB Construction company, for a consideration of Rs. 3,30,00,000/-on 20.02.2016 and the purchaser has deducted tax and filed TDS return in form 26QB showing TDS of Rs. 3,30,000/- on account of purchase of property from M/s Aakar Hotels. Further the said deed was also duly registered on 29.03.2016 and stamp duty of Rs. 18,15,000/-along with registration fees of Rs 30,000/- was paid to the government on account of transfer of property.*

v. The property was taken on lease by the Assessee on 28.08.1992 for Rs. 2,64,000/- and following expenditure were incurred by him in respect of which he submitted ledger account;

F.Y.	***Amount***
2005-06	*4,94,249/-*
2006-07	*80,000/-*
20014-15	*30,00,000/-*
2015-16	*12,00,000/-*

vi. Therefore, the claim of the assessee that there was no transfer of property is totally wrong and hence assessee's plea was rejected by Assessing officer.

vii. Therefore, in view of the above it can be concluded that there was transfer of property and the assessee has earned LTCG on the above transaction. The LTCG was calculated at Rs. 2,67,14,897/-and the same was added to the total income of the assessee for the relevant A. Y.

viii. During the appellate proceedings the assessee contended that - PNB construction company and Aakar hotel entered into deed of assignment and the same is infructuous as land belong to partners and not to the firm. The assessee's stance was further upheld by the CIT(A).

ix. However the finding of the CIT (A) is factually incorrect as land actually belongs to the partnership firm and not the partners in their individual capacity. Merely execution of the deed through partner's name does not mean that the property belongs to partners as it is a matter of fact that every execution of the partnership firm is acted through its partner in favour of the firm.

x. Now with respect to the issue that the impugned deed, executed between the appellant firm and PNB Construction Company is struck by the legal maxim "nemodat quod non habet", which literally means no one can give what they do not have. The CIT(A) concluded that the firm does not have any right over the property and the assignment deed is in the name of the partners, therefore, any transfer coming from the side of the assessee firm is illegal, incorrect and not tenable in the eye of law.

xi. Here the CIT (A) is factually incorrect as the assignment deed was executed by the firm itself, the name of the partners appear only because the deed was acted upon through the partners on behalf of the firm. Thus the finding given by CIT (A) that the property does not belong to the firm but belongs to its partners is totally incorrect. As it is a matter of fact, that every executions of the firm are made/acted through its partners.

xii. The CIT (A) further stated that the legal position of taxing a transaction as income under the head 'capital gains' is that there should be a capital asset first, Then the capital asset is to be transferred within the meaning of section 2(47) of the Act and it is chargeable to tax as per section 45 of the Act.

xiii. Here Sec 2(47) of IT Act is quoted below for reference :-

Section 2(47) in The Income Tax Act, 1961

(47) "transfer", in relation to a capital asset, includes,

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or

(iva) the maturity or redemption of a zero coupon bond: or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) : or

(vi) any transaction (whether by way of becoming a member of. or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring or enabling the enjoyment of, any immovable property.

Explanation 1.For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.

Explanation 2. -For the removal of doubts, it is hereby clarified that

"transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asser in any manner whatsoever. directly or indirectly, absolutely or conditionally, voluntarily or involuntarily. by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India:/(47A) "virtual digital asset" means-

(a) any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise. by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or

investment, but not limited to investment scheme: and can be transferred, stored or traded electronically;

b) a non-fungible token or any other token of similar nature, by whatever name called:

(c) any other digital asset. as the Central Government may, by notification in the Official Gazette specify:

Provided that the Central Government may, by notification in the Official Gazette, exclude any digital asset from the definition of virtual digital asset subject to such conditions as may be specified therein.

Explanation.— For the purposes of this clause,-(a) "non-fungible token" means such digital asset as the Central Government may, by notification in the Official Gazette, specify: (b)the expressions "currency", "foreign currency" and "Indian currency" shall have the same meanings as respectively assigned to them in clauses (h), (m) and (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999):

xiv. The assessee contended that section 2(47) of Income Tax Act does not stipulate any action of illegal encroachment as transfer. However the said claim is not relevant to the present matter as there is no case of encroachment in case of assessee and neither assessee tried to establish the same with documentary evidence. Thus Transfer of Property is very well covered under the definition of section 2(47) of Income Tax Act.

xv. Further it is to be noted that the assignment deed itself proves the existence of the capital asset in the hands of assessee. Also the purchaser/assignee has deducted tax and deposited it to the Govt. account, this itself is sufficient to establish that transfer has taken place.

xvi. The CIT(A) erred in concluding that since the land lease from MIDC belongs to partners in the individual capacity who are also partners in Aakar Hotel, the basic premise or basic charge for taxation of long term capital gains is not fulfilled.

xvii. Here it is again reiterated that the said property actually belong to the partnership firm and not to its partners, the deed was only acted through the partners for the sake of executing it on behalf of the firm. Further, the assessee failed to establish with documentary evidence that the property belong to the partners and not to the assessee. Also no documentary evidences were produced before A.O. to contend that property details were maintained in the books of accounts of the partners and not the assessee.

xviii. The sale deed/ assignment deed itself shows complete transfer of all pieces and parcel of land together with the building standing thereon covering a total build up area including all connection Thus, the deletion of entire addition by CIT (A) is incorrect and without any logic in absence of any documentary evidences.

xix. Notwithstanding the contention that land has been transacted by the firm only, if assessee contends that land does not belong to the firm then he should establish that the same is accounted in the books of individuals.

xx. In case Honourable Tribunal is inclined to accept the contention of the assessee that land belongs to individuals, then the Honourable ITAT should also provide a remedy to Revenue in the hands of individuals. It is further reiterated that this is without prejudice to the stand of revenue that the assessing officer had rightly taxed the capital gain in the hands of the firm."

7. Per contra, Learned Authorized Representative (in short "Ld.AR") relied on the order of the Ld.CIT(A)and prayed to sustain the same. Ld.CIT (DR) relied on his written submission and submitted that the same may be taken into account.

8. The factual matrix of the case is adumbrated below: -

"A. Assesse firm, Aakar Hotels, is a partnership firm formed on 28.08.1992 comprising of four partners namely Shri Madan Madhukar rao Yarawar, Shri Deepak Madhaorao Nillawar, Shri Atul Manoharrao Yamsanwar and Shri Ujwal Kisanrao Yamsanwar. The partners made a leasehold agreement with MIDC on the 1st day of November 1993, for leasehold right of land and premises admeasuring 3,000 Sq. Mts., at Plot No. X-1, Butibori Industrial Area, Vill. Rengapar, Talka Hingria, Nagpur - 441122, for 95 years. Further they decided to hold the property in individual capacities by entering into an understanding. It was also decided that the partnership will only run a business of hotel and restaurant. It was further decided that the usage of the above said land by the partnership shall not in any manner or way will transfer any title or ancillary rights to the partnership firm and the title or ancillary right will also vest with partners in their individual capacity.

B. On the 2nd of November, 2015, the MIDC executed an indenture of lease deed commencing from 01.11.1993. As a result of this, the assignor became an exclusive, absolute, and full owner of the afore-mentioned property with heritable and transferable rights. The aforesaid land is admeasuring 3000 Sq. mts. onto this land, there is a built-up structure of 50.050 Sq. Mts.. The assessee firm was only entitled to use the built-up structure of 50.050 Sq. Mts. the rest of the land was vacant and held by the partners in their personal capacity

C. The P.N.B. Construction Company approached the M/s Aakar Hotels, assessee for purchase of the built-up area (which is 50.050 sq.mts) on the aforesaid land. Since assessee firm does not have any right over the property and the assignment deed is in the name of the partners of the assessee firm, it

> *does not have any right whatsoever in any form, to transfer the personal property of the partners of the assessee. The P.N.B. Construction started using the entire area i.e. 3000 sq. mtrs. along with 50.050 sq. mtrs. built-up area as their right. Any illegal encroachment over the property does not give any right to the person encroaching over property. The assessee had filed a suit on 16.12.2020 before the Hon'ble Civil judge Senior Division, Nagpur, challenging the legality and correctness of right of the PNB Construction Company to occupy the whole part of the impugned property."*

9. We have heard both the sides and perused the material available on record. It is pertinent to refer to the observations of the Ld.CIT(A) who has granted relief by holding as under: -

> *"The legal position of taxing a transaction as income under the head capital gains is that there should be a capital asset, the capital assets has to be transferred within the meaning of section 2(47) of the Act and it has to be chargeable to tax as per section 45 of the Act. For an income to be considered as capital gain income in hands of an appellant, it is important that the income has arisen as per the provisions of section 45 of the Income Tax Act, 1961. Since the land lease from MIDC belongs to partners in the individual capacity who are also partners in Aakar Hotel, the basic premise or basic of charge for taxation of long term capital gains is not fulfilled. Further, no transfer of charge (lease land) can be attributed to transaction between Aakar Hotels and PNB constructions as the lease land belongs to the partners in the individual capacity. Hence, I delete addition of Rs. 2,67,14,897/- as Long Term Capital Gains."*

10. It is clear that the partners are the legal and beneficial owners of the lease hold land and the assignment was made only in their personal capacity. Since the lease hold right belongs to the partners in the individual capacity therefore in no way the firm can be considered to be owner of the capital asset, so as to impose the burden of tax on capital gain. The "partnership firm" and "partners" are different entities as per Income Tax Act, 1961. The Assessing Officer has misdirected

himself to understand the basic premise of ownership and has gone to tax the income in their own hands.

11. Further, we observe that the P.N.B. Construction Company approached the Assessee for purchase of the built-up area on the aforesaid land. Thereafter, the P.N.B. Construction Company and M/s Aakar Hotels entered into a Deed of Assignment. However, the same is infructuous and non-executable due to the fact that the land belongs to the partners and not the partnership firm M/s. Aakar Hotels. That the impugned deed, executed between the Assessee firm and PNB Construction Company is struck by the legal maxim "nemodat quod non habet", which literally means no one can give what they do not have. The Assessee firm does not have any right over the property and the assignment deed is in the name of the partners of the Assessee firm therefore, any transfer coming from the side of the Assessee is illegal, incorrect, and not tenable in the eyes of law. The Assessee firm does not have any right whatsoever in any form, to transfer the personal property of the partners of the Assessee.

12. From the records it is apparent that the entire proceeding has emanated out of the search action carried out in third party on 25.06.2019. Accordingly section 153C of the Act being a special provision should have been applied in accordance with section 153(1) of the Act which is narrated below: -

> *"153C(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—*

> *(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or*
>
> *(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,*
>
> *a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A:*
>
> *Provided that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person."*

13. In accordance with the above provision the date of reopening is 19.02.2021. Even if this date is considered as the date of initiation of search, A.Y. 2016-17 definitely is falling within the block of six years. We gainfully reproduce as below from Writ Petition No. 3057 of 2019, Hon'ble Bombay High Court in the case of Sejal Jewellary & Anr. *V.* Union of India & Ors.

> *"16. On a plain reading of Section 153A, it is clear that it begins with a 'nonobstante' clause, when it provides that notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st May, 2003 but on or before 31 March, 2021, the Assessing Officer shall have jurisdiction to issue notice to such person to furnish the return of income as specified in the notice or assess or reassess the total income as provided by the provision. Section 153C also begins with a non-obstante clause, when it provides that*

notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, to provide that, in a situation which may fall under Section 153C insofar as assessment of income of any other person is concerned, the Assessing Officer shall proceed against such other person and issue notice and assess or reassess the income of other persons in accordance with the provisions of Section 153A, if he is satisfied that the books of account or document or assets seized or requisitioned have a bearing on the determination of the total income of such person for a period as specified in the said provision and after compliance of other provisions as mandated. On the other hand, Section 147 provides for "Income escaping assessment", can be invoked when any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year. In such situation, the Assessing Officer may subject to the provisions of Sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year and for which a prior notice under Section 148 would be required to be issued. Section 147 does not contemplate an eventuality which Section 153A or Section 153C contemplates, the basis of which is inter alia a search action under Section 132 being resorted as noted hereinabove. Thus, both these provisions are quite compartmentalized although the deeming effect of both the provisions, may be the same. However, the situations in which such provisions operate are required to be invoked are completely different. This is clear from the bare reading of the provisions, hence would not warrant any elaborate discussion.

17. The purport and effect of these provisions had fell for consideration ofthe Supreme Court in Abhisar Buildwell P. Ltd. (supra), wherein the scope of assessment under Section 153A of the I.T. Act was considered. In this case, the Revenue's contention was to the effect that the Assessing Officer was competent to consider all the materials which were available on record, including the materials found during search so as to make an assessment of the total income. Some of the High Courts had accepted such propositions. However, the assessee had contended that there were also decisions of the High Courts to the effect that if assessment proceedings were not pending on the date of initiation of the search, the Assessing Officer needs to consider only the incriminating material found during the search, and was precluded from considering any other material derived from any other source. It is in such context, the Supreme Court considering the purport of the provisions of Section 153A of the I.T. Act, vis a vis its applicability qua the provisions of Section 147, and the applicability of Section 132, 132A and notably the decision of the Delhi High Court in Commissioner of Income Tax, Central-III vs. Kabul Chawla inter alia held that the provisions of Section 153A(1) need to be mandatorily resorted once a search takes place. The Supreme Court held as under:

> *"7.1 In the case of Kabul Chawla (supra), the Delhi High Court, while considering the very issue and on interpretation of Section 153A of the Act, 1961, has summarised the legal position as under*
>
> *Summary of the legal position*

38. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the searchshall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the sixyears previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictlymade on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessmentcan be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e., those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction tomake the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO whilemaking the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

18. The Supreme Court held that it was in complete agreement with theview taken by the Delhi High Court in Kabul Chawla (supra) and of the Gujarat High Court in Principal Commissioner of Income Tax-4 vs. Saumya Construction taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.

19. Insofar as the present proceedings are concerned, the following observations made by the Supreme Court in the context of Section 147 and 148 of the I.T. Act need to be noted:

> *"11. As per the provisions of Section 153A, in case of a search under Section 132 or requisition under Section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub- section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under Section 132 or requisition under Section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under Sections 147/148 of the Act, subject to fulfillment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the*

search, the power of the Revenue to have the reassessment under Sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

12. If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under Section 153A of the Act is linked with the search and requisition under Sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and sub- section (2) of Section 153A would be redundant and/or re- writing the said provisions, which is not permissible under the law."

20. It is thus clear that in the event any incriminating material is foundduring the search, the Revenue necessarily would be required to take recourse to the provisions of Section 153A and in the event no incriminating material found during the search, then the power of the Revenue to have the reassessment under Sections 147/148 of the I.T. Act stands saved, failing which, the Revenue would be left without remedy. It is on such observations the conclusions as rendered by the Supreme Court and which are relevant to the case in hand, are required to be noted, which reads thus:

"14. In view of the above and for the reasons stated above, it is concluded as under:

i) that in case of search under Section 132 or requisition under Section132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income

declared in the returns; and iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under Sections 147/148 of the Act and those powers are saved.

The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs."

21. The Rajasthan High Court in Shyam Sunder Khandelwal s/o. Late Damodar Lal Khandelwal vs. Assistant Commissioner of Income Tax, Central Circle-2, Jaipur (supra) also had taken a similar view when the issue which had arisen before the Court was in regard to the notice issued under Section 148 of the I. T. Act, the basis of issuance of such notice was the material seized during search. The contention of the assessee was to the effect that in the said circumstances, the proceedings ought to have been initiated under Section 153C of the I.T. Act. The Division Bench referring to the decision of Supreme Court in Abhisar Buildwell P. Ltd. (supra) as also the decision of Karnataka High Court in Sri Dinakara Suvarna (supra) allowed the petitions observing that the department had not set up a case, that for initiating proceedings under Section 148, it had material other than the material seized during the search of a related party. The relevant observations of the Division Bench are required to be noted, which reads thus:

"23. The reasons supplied in case in hand for initiation of proceedings under Section 147/148 are based on the incriminating material and documents including Pen Drives seized during the search carried out of the Manihar Group and the statements recorded during proceedings. From the information received the AO noticed that the loan advanced and interest earned thereon were unaccounted. In other words the basis for initiation of Section 148 proceedings is the material seized relating to or belonging to the petitioner, during the search conducted of Manihar Group.

24. In the case where search or requisition is made, the AO under Section153A mandatorily is required to issue notices to the assessee for filing of income tax return for the relevant preceding years. The AO assumes jurisdiction to assess/reassess 'total income' by passing separate order for each assessment.

25. In cases of the person other than on whom search was conducted butmaterial belonging or relating such person was seized or requisition, the AO has to proceed under Section 153C. The two

pre-requisites are that the AO dealing with the assessee on whom search was conducted or requisition made, being satisfied that seized material belongs or relates to other assessee shall hand over it to AO having jurisdiction of such assessee. Thereafter, the satisfaction of AO receiving the seized material that the material handed over has a bearing for determination of total income of such other person for the relevant preceding years. On fulfillment of twin conditions the AO shall proceed in accordance with the provisions of Section 153A.

26. Special procedure is prescribed under Section 153A to 153D for assessment in cases of search and requisition. There cannot be a quibble with the proposition that the special provision shall prevail over the general provision. To say it differently the provisions of Section 153A to 153D have prevalence over the regular provisions for assessment or reassessment under Section 143 & 147/148.

27. Section 153A and 153C starts with non-obstante clause. The procedure for assessment/reassessment in Section 153A, 153C in cases of search or requisition has an overriding effect to the regular provisions for assessment or reassessment under Sections 139, 147, 148, 149, 151 & 153.

28. The language of explanation 2 to new Section 148 is akin to Section 153A and Section 153C. Corollary being that after seizing of operational period of Section 153A to 153D, the cases being dealt thereunder were circumscribed in the scope of newly substituted Section 148."

We are in complete agreement with the view taken by the Division Bench of Rajasthan High Court in the aforesaid decision.

22. Applying the principles of law as discussed hereinabove, we are of the clear opinion that the foundation of the present case was certainly a search action which was undertaken by the Revenue against one Shilpi Jewellers Pvt. Ltd. and in such search and seizure action, materials were seized and such materials were further explored and enquired. Such enquiry revealed significant information in regard to M/s. Green Valley Gems Pvt. Ltd., which according to the Revenue had provided accommodation entries to the petitioner, in which it was also revealed that Green Valley Gems Pvt. Ltd. was a shell company. We do not find that the record would indicate something which is not on the basis of such new materials gathered under the search and seizure action under Section 132. If this be the case, then certainly the provisions of Section 153C read with Section 153A would be applicable, as held by the Supreme Court in Abhisar Buildwell P. Ltd. (supra) when the Court interpreted the effect and purport of Section 153C and 153A, as also held by the Rajasthan High Court in Shyam Sunder Khandelwal (supra).

23. Insofar as Mr. Suresh Kumar's contention supporting the proceedings under Section 147 and 148 of I.T. Act are concerned, for the aforesaid reasons, such contention would in fact go contrary to the intention of the legislature as depicted by the provisions of Section 153A and 153C of the I.T.

Act. There would not be any difficulty in accepting the proposition as canvassed by Mr. Suresh Kumar, referring to the decision of the Supreme Court in Phool Chand Bajrang Lal (supra), however, the facts in the present case are distinct. There cannot be any doubt on the position in law when the Revenue intends to proceed purely on materials relevant for an action under Section 148 read with Section 147. We have already observed that the provisions of Sections 147, 148 vis-a-vis Section 153A and Section 153 are quite compartmentalized. To avoid any overlapping of these provisions, the legislature in its wisdom has thought it appropriate to provide for an independent effect, to be given under Section 153A read with Section 153C by incorporating the "non-obstante" clause, in these provisions, which carves out an exception to any normal/regular action being resorted under Section 147."

14. Accordingly, the invocation of section 147 of the Act is egregiously erroneous. The addition made by the Assessing Officer has been rightly deleted by the Ld.CIT(A). Accordingly, appeal of the revenue is dismissed since Assessing Officer has failed to apply the correct provision for conducting assessment as well as failed to identify the actual assessee upon which the tax is exigible.

15. In the result, appeal of the revenue is dismissed.

Order pronounced in the open Court on 09/06/2025

Sd/-	**Sd/-**
V. DURGA RAO	**K.M. ROY**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

DATED: 09/06/2025
Giridhar, Sr. PS (On Tour)

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Nagpur; and
(5) Guard file.

//True Copy//

By Order

Sr. Private Secretary
ITAT, Nagpur